

TTAB

PETER H. SMITH

ATTORNEY AT LAW

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MODESTO, CALIFORNIA 95353

MEMBER OF CALIFORNIA
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TELEPHONE (209) 579-9524
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June 13, 2005

Peter Cataldo, Interlocutory Attorney
U.S. Patent & Trademark Office
Trademark Trial & Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Response to Order to Show Cause
Gold Shells, Inc. v. Cangiarella
Opposition No. 91162780



06-16-2005

U.S. Patent & TMO/TM Mail Rpt Dt. #72

Dear Mr. Cataldo:

This will respond to your order to show cause why judgment by default should not be entered against opposer as counterclaim defendant in the above-referenced opposition.

Your communication mailed June 1, 2005, states, "... it appears that no answer has been filed ...", and enters default as against opposer as counterclaim defendant.

I respectfully submit that the opposer's answer was timely delivered to your office for filing. I am enclosing copies of (1) Respondent's Answer to Applicant's Counterclaim for Cancellation, and (2) Motion of Respondent Roger Rojas for Substitution of Gold Shells, Inc., as Respondent, along with the cover letter dated April 27, 2005. Please note that page 10 of the answer includes a certificate of express mailing under 37 C.F.R. Section 2.198, signed by my secretary, Eugene M. Borba, certifying that the answer was deposited on April 27, 2005, with the United States Postal Service "Express Mail Post Office to Addressee" service in an envelope addressed to U.S. Patent & Trademark Office, Trademark Trial & Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451.

I am also enclosing a copy of a "track and confirm" message I received from the U.S. Postal Service by e-mail following delivery. It recites that my express mail item number ED44 8781 823US was delivered at 10:11 a.m. on April 29, 2005, in Alexandria, Virginia 22314, to "Trademark 1451" and was signed for by D. Barfield. I am further

Peter Cataldo
June 13, 2005
Page 2

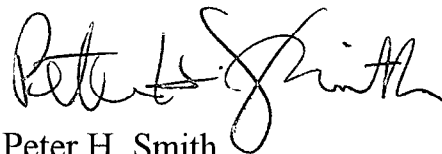
enclosing a copy of a communication dated June 7, 2005, from the U.S. Postal Service re-confirming this delivery record.

I am further enclosing copies of my receipts for the express mail, one showing the address to which the answer was sent and the other showing that payment was made.

Finally, I am enclosing a copy of a receipt stamp from the U.S. Patent & Trademark Office showing a receipt date of April 29, 2005, affixed to the back of a self-addressed stamped envelope which I had enclosed with the mailing for this purpose.

I respectfully request that you set aside the default in this matter, filed respondent's answer to applicant's counterclaim for cancellation effective April 27, 2005, the date of mailing, and respond to respondent's motion for substitution of Gold Shells, Inc., as a respondent.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter H. Smith", written in a cursive style.

Peter H. Smith
Attorney for Counterclaim Respondent
Roger Rojas and Opposer Gold Shells, Inc.

PHS/lmb
Enclosures

Member of California
and Oregon State Bars

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Telephone (209) 579-9524
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April 27, 2005

VIA EXPRESS MAIL ED 448781823 US

U.S. Patent & Trademark Office
Trademark Trial & Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Opposition No. 91162780 and Counterclaim for Cancellation
Applicant/Petitioner: Keith Cangiarella
Opposer: Gold Shells, Inc.
Respondent: Roger Rojas

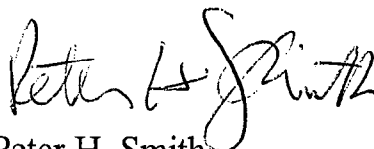
Ladies/Gentlemen:

I am enclosing the original of (1) Respondent's Answer to Applicant's Counterclaim for Cancellation and (2) Motion of Respondent Roger Rojas for Substitution of Gold Shells, Inc., as Respondent, each for filing in the above-referenced proceeding.

I am also enclosing a copy of the first page of each of these documents. Please endorse these pages with your file stamp and return them to me in the enclosed self-addressed, stamped envelope to acknowledge your receipt and filing of these documents.

Thank you.

Very truly yours,


Peter H. Smith

PHS/lmb
Enclosures

cc: Gold Shells, Inc.
Mr. Roger Rojas

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

<p>In the Matter of Trademark Application Serial No. 78/229,875 Mark: MESSAGE IN A BOTTLE</p> <p>GOLD SHELLS, INC., a California corporation, Opposer,</p> <p>v.</p> <p>KEITH CANGIARELLA, Applicant.</p> <p>-----</p> <p>In the Matter of Trademark Registration No. 2,243,269 Mark: MESSAGE IN A BOTTLE</p> <p>KEITH CANGIARELLA, Petitioner,</p> <p>v.</p> <p>ROGER ROJAS, Respondent.</p>	<p>Opposition No. 91162780 and Counterclaim for Cancellation</p>
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**MOTION OF RESPONDENT ROGER ROJAS FOR SUBSTITUTION
OF GOLD SHELLS, INC., AS RESPONDENT**

In the above-referenced proceeding, Applicant/Petitioner Keith Cangiarella has filed a counterclaim against Respondent Roger Rojas for cancellation of Registration No. 2,243,269 for MESSAGE IN A BOTTLE. In fact, on April 8, 2005, the U.S. Patent & Trademark Office gave notice of recordation of assignment of this registration from Roger Rojas to Gold Shells, Inc., the Opposer herein, with a recordation date of October 15, 2004. The assignment is recorded as no. 102859988 on Reel No. 003061, Frame No. 0965, in the

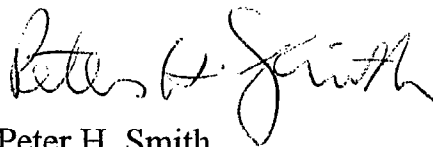
Assignment Division of the U.S. Patent & Trademark Office.

Trademark Rule 2.113(c) says, in part, "The respondent shall be the party shown by the records of the Office to be the current owner of the registration(s) sought to be cancelled, except that the Board, in its discretion, may join or substitute as respondent a party who makes a showing of current ownership interest in such registration(s)."

To avoid confusion in the above-referenced proceeding, Respondent Roger Rojas hereby moves that the Trademark Trial & Appeal Board substitute Gold Shells, Inc., for him as Respondent in the counterclaim for cancellation.

Dated April 27, 2005.

Respectfully submitted,

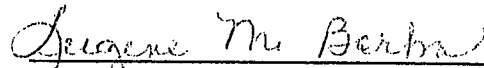
A handwritten signature in black ink, appearing to read "Peter H. Smith". The signature is fluid and cursive, with the first name "Peter" and last name "Smith" being clearly legible.

Peter H. Smith
Attorney at Law
1535 J Street, Suite A
P.O. Box 1867
Modesto, CA 95353
Telephone: (209) 579-9524
Facsimile: (209) 579-9940

Attorney for Respondent Roger Rojas and
Opposer Gold Shells, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Respondent Roger Rojas for Substitution of Gold Shells, Inc., as Respondent was mailed first class mail, postage pre-paid, to Stephen L. Anderson, Esq., and Hao Fang, Esq., Anderson & Associates, 27349 Jefferson Avenue, Suite 211, Temecula, CA 92590, attorneys for Applicant/Petitioner Keith Cangiarella, on April 27, 2005.


Lugene M. Borba

CERTIFICATE OF EXPRESS MAILING UNDER 37 CFR §2.198

Mark: MESSAGE IN A BOTTLE

Registration No.: 2,243,269

Opposition No.: 91162780

Mailing Date: March 30, 2005

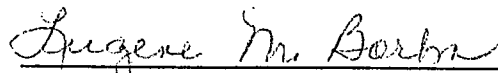
Name of parties filing paper: Roger Rojas and Gold Shells, Inc.

Type of paper being filed: Motion of Respondent Roger Rojas for Substitution of Gold Shells, Inc., as Respondent

Express Mail Mailing Label Number: ED 448781823 US

Date of Deposit: April 27, 2005

I hereby certify that the above-identified motion of respondent Roger Rojas for substitution of Gold Shells, Inc., as respondent, which is attached, is being deposited on April 27, 2005, with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR §2.198 in an envelope addressed to: U.S. Patent & Trademark Office, Trademark Trial & Appeal Board, P. O. Box 1451, Alexandria, VA 22313-1451.


Lugene M. Borba
Date: April 27, 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

<p>In the Matter of Trademark Application Serial No. 78/229,875 Mark: MESSAGE IN A BOTTLE</p> <p>GOLD SHELLS, INC., a California corporation, Opposer,</p> <p>v. KEITH CANGIARELLA, Applicant.</p> <p>-----</p> <p>In the Matter of Trademark Registration No. 2,243,269 Mark: MESSAGE IN A BOTTLE</p> <p>KEITH CANGIARELLA, Petitioner,</p> <p>v. ROGER ROJAS, Respondent.</p>	<p>Opposition No. 91162780 and Counterclaim for Cancellation</p>
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**RESPONDENT'S ANSWER TO APPLICANT'S COUNTERCLAIM
FOR CANCELLATION**

Gold Shells, Inc., ("Opposer") acting by virtue of an assignment from Roger Rojas ("Respondent") recorded in the U.S. Patent & Trademark Office on October 15, 2004, in Reel No. 003061, Frame No. 0965, having filed opposition no. 91162780 to the application of Keith Cangiarella ("Applicant") for the mark MESSAGE IN A BOTTLE, Serial No. 78/229,875, and Applicant having thereafter filed an answer to the opposition and a counterclaim for cancellation of Opposer's Registration No. 2,243,269 for MESSAGE IN

A BOTTLE, and notice of said counterclaim having been mailed to the Respondent and Opposer by the Trademark Trial & Appeal Board on March 30, 2005, Respondent hereby answers the counterclaim as set forth below, generally and specifically denying each and every allegation contained in the counterclaim which is not specifically admitted, modified, or qualified as set forth below, and hereby demands strict proof of each and every such allegation:

1. Respondent admits the allegations of paragraph 1.
2. Respondent lacks sufficient information or belief to admit or deny the allegations contained in paragraphs 2 and 3, the first paragraph 4, the first paragraph 5, and the second paragraph 4 of the counterclaim and denies those allegations on that ground.
3. Respondent denies the allegations contained in the first sentence of the second paragraph 5 in the counterclaim. Respondent lacks sufficient information or belief to admit or deny the allegations contained in the second sentence of the second paragraph 5 of the counterclaim and denies those allegations on that ground.
4. In response to paragraph 6 of the counterclaim, Respondent admits that Applicant filed a trademark application on March 25, 2003, for MESSAGE IN A BOTTLE on the Principal Register, but denies all the remaining allegations in that paragraph.
5. Respondent lacks sufficient information or belief to admit or deny the allegations contained in paragraph 7 of the counterclaim and denies those allegations on that ground.

6. In response to the first sentence of paragraph 8 of the counterclaim, Respondent admits that on October 21, 2004, Gold Shells, Inc., a California corporation, as the successor in interest to Respondent, relying on the registration of the service mark MESSAGE IN A BOTTLE, filed the opposition herein to Applicant's application, and Respondent denies all the remaining allegations contained in that sentence. In response to the second sentence of said paragraph 8, Respondent admits that the registration relied on in said opposition was initially obtained by Respondent and is now in the name of Gold Shells, Inc., a California corporation, based on an assignment from Respondent recorded October 15, 2004, and Respondent denies all the remaining allegations contained in that sentence. In response to the third sentence of said paragraph 8, Respondent admits the allegations therein.

7. Respondent admits the allegations of paragraph 9 of the counterclaim, noting however that Respondent signed the sworn declaration referred to therein on January 19, 1999, and mailed it to the U.S. Patent & Trademark Office on January 26, 1999, and lacks information and belief as to the actual filing date thereof in the U.S. Patent & Trademark Office.

8. Respondent denies the allegations contained in paragraph 10 of the counterclaim.

9. Respondent denies the allegations contained in the first sentence of paragraph 11 of the counterclaim. In response to the second sentence thereof, Respondent admits that he and his successor have sold novelty and souvenir gift bottles containing

personalized messages of others, but otherwise denies the allegations thereof.

10. Respondent admits the allegations of the first and second sentences of paragraph 12 of the counterclaim, except that Respondent denies that he alleged that he had first used the mark MESSAGE IN A BOTTLE in connection with “receiving communications from others, recording such communications in written or printed form from others, and transmitting such communications to others”, and Respondent denies the accuracy of Applicant’s use of “(sic)” in the second sentence. Respondent denies the allegations of the third sentence of paragraph 12 of the counterclaim.

11. Respondent denies the allegations of paragraph 13 of the counterclaim.

12. Respondent denies the allegations of the first sentence of paragraph 14 of the counterclaim, and admits the allegations of the second sentence of paragraph 14 of the counterclaim.

13. In response to paragraph 15 of the counterclaim, Respondent admits that the U.S. Patent & Trademark Office granted him a registration for MESSAGE IN A BOTTLE, but otherwise denies all of the allegations thereof.

14. Respondent denies the allegations contained in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the counterclaim.

15. In response to the first sentence of paragraph 25 of the counterclaim, Respondent admits that Applicant has used the mark MESSAGE IN A BOTTLE in the United States in connection with his business producing and selling souvenir bottles

containing messages, but otherwise denies all of the allegations contained therein. Respondent admits the allegations contained in the second sentence of paragraph 25 of the counterclaim.

16. Respondent lacks sufficient information or belief to admit or deny the allegation contained in paragraph 26 of the counterclaim and denies that allegation on that ground.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

17. The counterclaim fails to state facts sufficient to constitute a cause of action against Respondent for cancellation of the registration.

SECOND AFFIRMATIVE DEFENSE

(Defect of Parties)

18. There is a defect of parties in that Applicant in its counterclaim has named only Roger Rojas, the predecessor of the Gold Shells, Inc., current owner of Registration No. 2,243,269 for MESSAGE IN A BOTTLE, despite an assignment of said registration from Roger Rojas to Gold Shells, Inc., having been recorded in the U.S. Patent & Trademark Office on October 15, 2004, in Reel No. 003061, Frame No. 0965.

THIRD AFFIRMATIVE DEFENSE

(Misjoinder of Parties)

19. There is a misjoinder of parties in the counterclaim in Applicant's naming Roger Rojas as the respondent, as Roger Rojas is no longer a proper party in that he no

longer has an interest in the subject of the action alleged in the counterclaim except in his capacity as the President and shareholder of Gold Shells, Inc., the current owner of the registration in issue.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

20. Applicant became aware of Respondent's mark in 1997, but failed to file the counterclaim until December, 2004, a delay of over seven years. During that time, Respondent has continued to invest money and build good will in the mark MESSAGE IN A BOTTLE. As a result, the counterclaim should be barred by laches.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands; Fraud)

21. Applicant has not come to the Trademark Trial & Appeal Board with clean hands. More specifically, he has infringed on the rights of Respondent and his successor in regard to the mark MESSAGE IN A BOTTLE, and he has committed fraud in the trademark application opposed by Opposer in stating under oath that to the best of his knowledge and belief no one other than him had the right to use the mark in commerce when in fact he knew about Respondent's 1997 application for registration at that time. As a result, Applicant is not entitled to the relief requested in the counterclaim.

SIXTH AFFIRMATIVE DEFENSE

(Waiver)

22. Applicant has waived his right to maintain the counterclaim in that he adopted

the mark MESSAGE IN A BOTTLE and commenced use of that mark in the marketplace in 1997 with the knowledge that Respondent had previously filed an application for registration of the same mark for services which were similar to Applicant's services, and Applicant failed to file an opposition to Respondent's application when it was published for opposition.

SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

23. Applicant's counterclaim is barred by the doctrine of estoppel in that he adopted the mark MESSAGE IN A BOTTLE and commenced use of that mark in the marketplace in 1997 with the knowledge that Respondent had previously filed an application for registration of the same mark for services which were similar to Applicant's services, and Applicant failed to file an opposition to Respondent's application when it was published for opposition.

EIGHTH AFFIRMATIVE DEFENSE

(Use on Mark with Services as Described in Registration)

24. Since January 16, 1999, and through constructive use since January 6, 1997, Respondent and his successor have been, and his successor is now, operating under the designation MESSAGE IN A BOTTLE in selling communication services as recited in Respondent's registration.

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NINTH AFFIRMATIVE DEFENSE
(Priority Right of Respondent)

25. Respondent has a priority right to use the mark MESSAGE IN A BOTTLE through constructive use based on the filing date of his original intent-to-use service mark application, January 6, 1997, which is prior to Applicant's filing date, which was March 25, 2003, or Applicant's claimed first use in commerce, which was June 10, 1998. Use by Respondent and his successor have been valid and continuous since the date of first use and have not been abandoned. Respondent's priority is based on Section 7(c) of the Lanham Act (15 U.S.C. §1057), and Applicant does not fit any of the exceptions thereto.

TENTH AFFIRMATIVE DEFENSE
(Incontestability)

26. Respondent has continuously used the registered mark MESSAGE IN A BOTTLE in commerce, for the services in connection with which it was registered, for over five consecutive years subsequent to the date of such registration. Within one year after the five-year anniversary date, Respondent filed an affidavit with the U.S. Patent & Trademark Office as required by Section 15(3) of the Lanham Act (15 U.S.C. §1065), and the U.S. Patent & Trademark Office on December 9, 2004, mailed notice of its acceptance and acknowledgment of Respondent's combined declaration of use and incontestability, advising that it had found that the affidavit meets the requirements of Sections 8 and 15 of the Lanham Act. Therefore, Respondent's registration no. 2,243,269 for MESSAGE IN A BOTTLE is incontestable.

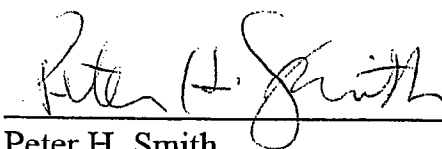
ELEVENTH AFFIRMATIVE DEFENSE

(Cancellation Counterclaim Not Filed Within Five Years From Registration Date)

27. The date of the registration which Applicant seeks to cancel was May 4, 1999, and Applicant's counterclaim for cancellation of this registration was filed on December 10, 2004, more than five years thereafter. Therefore, the counterclaim was not timely filed as required by Section 14(1) of the Lanham Act (15 U.S.C. §1064) and Trademark Rule Section 2.111(b). None of the other fact situations under that statute and that rule in which a cancellation proceeding may be filed without this time limitation are applicable in this case.

WHEREFORE, Respondent requests that Applicant's counterclaim for cancellation be rejected, that the opposition of Opposer to Applicant's application be sustained in favor of Opposer, that no registration be issued to Applicant, and that the Trademark Trial & Appeal Board award any other and further relief in favor of Respondent and Opposer which it considers proper.

Dated: April 27, 2005.

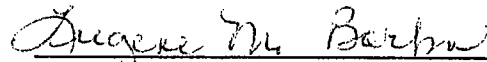


Peter H. Smith
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Facsimile: (209) 579-9940

Attorney for Respondent Roger Rojas and
Opposer Gold Shells, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Answer to Applicant's Counterclaim for Cancellation was mailed first class mail, postage pre-paid, to Stephen L. Anderson, Esq., and Hao Fang, Esq., Anderson & Associates, 27349 Jefferson Avenue, Suite 211, Temecula, CA 92590, attorneys for Applicant/Petitioner Keith Cangiarella, on April 27, 2005.

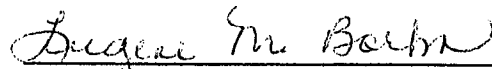

Lugene M. Borba

CERTIFICATE OF EXPRESS MAILING UNDER 37 CFR §2.198

Mark: MESSAGE IN A BOTTLE
Registration No.: 2,243,269
Opposition No.: 91162780
Mailing Date: March 30, 2005
Name of parties filing paper: Roger Rojas and Gold Shells, Inc.
Type of paper being filed: Respondent's Answer to Applicant's Counterclaim for Cancellation

Express Mail Mailing Label Number: ED 448781823 US
Date of Deposit: April 27, 2005

I hereby certify that the above-identified Respondent's Answer to Applicant's Counterclaim for Cancellation, which is attached, is being deposited on April 27, 2005, with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR §2.198 in an envelope addressed to: U.S. Patent & Trademark Office, Trademark Trial & Appeal Board, P. O. Box 1451, Alexandria, VA 22313-1451.


Lugene M. Borba
Date: April 27, 2005

1205



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The following is in response to your 06/07/2005 request for delivery information on your Express Mail item number ED44 8781 823U S. The delivery record shows that this item was delivered on 04/29/2005 at 10:11 AM in ALEXANDRIA, VA 22314 to D BARFIELD. There is no delivery signature on file for this item.

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04-29-2005



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Peter H. Smith
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